

No. PD-0021-17

In the Court of Criminal Appeals
of the State of Texas

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Kaitlyn Lucretia Ritcherson,
Appellant

v.

The State of Texas,
Appellee

Appeal from the Texas Court of Appeals
Third District, at Austin
03-13-00804-CR

STATE'S BRIEF

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STATE’S BRIEF

To the Honorable Court of Criminal Appeals:

Now comes the State of Texas and files this brief in response to that of the appellant.

Summary of the State’s Argument

Appellant argues that the court of appeals erred because it failed to apply *Saunders* to her case. *Saunders* should be overruled because its holding is illogical and it conflicts with numerous decisions from this Court requiring affirmative evidence.

Appellant also contends that the court of appeals conducted a sufficiency-of-the-evidence analysis instead of a lesser-included

offense analysis, but the lower court's opinion shows that the court laid out the proper test and concluded that Appellant did not meet it.

Finally, whether or not the lower court conducted the analysis accurately, the fact remains that Appellant is not entitled to an instruction on manslaughter. Appellant points to evidence that shows that she stabbed the victim in the chest because the victim hit Appellant on the head. There is nothing about this evidence that would permit a jury to rationally find that Appellant is guilty only of manslaughter. The judgment should be affirmed.

Argument

I. The two-step test

Courts apply a two-step test to determine whether a defendant is entitled to an instruction on a lesser-included offense. First, the court determines whether the proof necessary to establish the charged offense also establishes the lesser offense. *Cavazos v. State*, 382 S.W.3d 377, 382 (Tex. Crim. App. 2012). Both parties agree that the first step of the test is met because the only difference between murder and manslaughter is a less culpable mental state. *Id.* at 384.

The second step asks whether there is evidence in the record that supports giving the instruction to the jury. The evidence may be weak or contradicted, but the evidence must still be directly germane to the lesser-included offense and must rise to the level that a rational jury could find that if Appellant is guilty, she is guilty only of the lesser-included offense. Meeting this threshold requires more than mere speculation—it requires affirmative evidence that both raises the lesser-included offense and rebuts or negates an element of the greater offense. *Id.* at 385.

The purpose behind the second step is to ensure that the jury is instructed on a lesser-included offense only when that offense constitutes a valid, rational alternative to the charged offense. If a jury were instructed on a lesser-included offense even though the evidence did not raise it, then the instruction would constitute an invitation to the jury to return a compromise or otherwise unwarranted verdict. *Segundo v. State*, 270 S.W.3d 79, 91 n.35 (Tex. Crim. App. 2008). Juries are not to be given the discretion to pick and choose what offense the accused should be found guilty of. To be entitled to an instruction on a lesser offense, the evidence must throw

doubt upon the greater offense. *Arevalo v. State*, 943 S.W.2d 887, 889 (Tex. Crim. App. 1997).

II. Saunders

Appellant argues that the court of appeals erred because it failed to apply *Saunders* to her case.

Saunders held that there are two ways in which the evidence may indicate that a defendant is guilty only of the lesser offense. First, there may be evidence that affirmatively refutes or negates other evidence establishing an element of the greater offense. Second, the evidence presented may be subject to different interpretations, one of which negates or rebuts an element of the greater offense. *Saunders v. State*, 840 S.W.2d 390, 391-92 (Tex. Crim. App. 1992); *explained in Schweinle v. State*, 915 S.W.2d 17, 19 (Tex. Crim. App. 1996).

Saunders should be overruled because its holding is illogical—the evidence that establishes the greater offense cannot show that the appellant is guilty *only of* the lesser offense.

Additionally, *Saunders* conflicts with numerous decisions from this Court, which has repeatedly held that the appellant must point to affirmative evidence that both raises the lesser-included offense and

rebutts or negates an element of the greater offense before the trial court is required to give an instruction on the lesser offense. *See Roy v. State*, 509 S.W.3d 315, 317-18 (Tex. Crim. App. 2017); *Wortham v. State*, 412 S.W.3d 552, 558 (Tex. Crim. App. 2013); *Cavazos v. State*, 382 S.W.3d 377, 385 (Tex. Crim. App. 2012); *Goad v. State*, 354 S.W.3d 443, 447 (Tex. Crim. App. 2011); *Mays v. State*, 318 S.W.3d 368, 387 (Tex. Crim. App. 2010); *Schmidt v. State*, 278 S.W.3d 353, 362 (Tex. Crim. App. 2009); *Hall v. State*, 158 S.W.3d 470, 474 (Tex. Crim. App. 2005); *Hampton v. State*, 109 S.W.3d 437, 441 (Tex. Crim. App. 2003).

The cases cited by *Saunders* to support its “different interpretations” holding all involve affirmative evidence as well. *See Saunders*, 840 S.W.3d at 392, citing *Thomas v. State*, 699 S.W.2d 845, 849-52 (Tex. Crim. App. 1985) (appellant not entitled to an instruction even though he testified that he did not intent to shoot and gun discharged accidentally); *Schoelman v. State*, 644 S.W.2d 727, 734 (Tex. Crim. App. 1983) (appellant entitled to an instruction because she testified that she was not aware of the risk her conduct created and that the gun accidentally discharged when she was

grabbed); *Lugo v. State*, 667 S.W.2d 144, 145 (Tex. Crim. App. 1984) (appellant entitled to an instruction because he testified that he did not intent to kill his wife, he did not cock or load gun, and he thought it was unloaded); *Bell v. State*, 693 S.W.2d 434, 443 (Tex. Crim. App. 1985) (appellant entitled to an instruction because he testified that he did not intent to shoot at victim); and *Aguilar v. State*, 682 S.W.2d 556, 557-58 (Tex. Crim. App. 1985) (appellant not entitled to an instruction because he did not testify or offer any evidence to show he was guilty only of the lesser offense).

In any case, whether the Court requires “affirmative evidence” or allows a “different interpretation” of the evidence, the evidence still must satisfy the second set of the two-step test—it must be *directly germane* to the lesser offense and must be such that a jury could rationally find that the appellant is guilty *only of* the lesser offense. *Cavazos*, 382 S.W.3d at 385.

III. The lower court’s analysis

Appellant contends that the court of appeals conducted a sufficiency-of-the-evidence analysis instead of a lesser-included offense analysis.

The court of appeals laid out the two-step test for a lesser-included offense, examined all of the evidence, and held that the evidence does not rationally support the lesser offense. *Ritcherson*, 476 S.W.3d at 116-27. Thus, the court applied the proper test and concluded that Appellant did not meet it.

It is true that the court of appeals also made statements to the effect that the jury could have found that Appellant intentionally or knowingly caused death or intended to cause seriously bodily injury. But this does not negate the explicit holding that the evidence does not allow a rational jury to conclude that if Appellant is guilty, she is guilty only of manslaughter. *Id.* at 127.

IV. Appellant is not entitled to an instruction on manslaughter

Whether or not the lower court conducted the analysis accurately, the fact remains that Appellant is not entitled to an instruction on manslaughter.

The State charged that Appellant intentionally and knowingly caused Fatima Barrie's death and, with intent to cause serious bodily

injury, committed an act clearly dangerous to human life that caused the Fatima Barrie's death. CR 20.

The disputed element in this case is Appellant's *mens rea*. Thus, to be entitled to an instruction on manslaughter, there must be some evidence that: 1) she did not intentionally cause death, i.e., it was not her conscious objective or desire to cause death, 2) she did not knowingly cause death, i.e., she was not aware that her conduct (stabbing the victim in the chest with a knife) was reasonably certain to cause death, 3) she did not intend to cause serious bodily injury, i.e., it was not her conscious objective or desire to cause serious bodily injury, and there must also be some evidence that 4) she recklessly caused death, i.e., she was aware of but consciously disregarded a substantial and unjustifiable risk that death would occur. Tex. Penal Code §§ 6.03, 19.02(b)(1), (b)(2), 19.04; *Mays*, 318 S.W.3d at 387; *Roy*, 509 S.W.3d at 317-19; *Schroeder v. State*, 123 S.W.3d 398, 401 (Tex. Crim. App. 2003).

Most of the evidence that Appellant pointed to in the court of appeals has nothing to do with Appellant's mental state at the time of the stabbing. For example, Appellant argued that the direction of the

wound track supports her request for an instruction on manslaughter because, Appellant argued, it contradicts a witness's account that Appellant reached over the victim's right shoulder and stabbed her on the left side. 23RR 98; 24RR 210, 229.

That does not make sense. This evidence has nothing to do with Appellant's mental state at the time of the stabbing. This evidence is not directly germane to the lesser-included offense, and it does not permit a jury to rationally find that if Appellant is guilty, she is guilty only of manslaughter.

Appellant also argued that she is entitled to an instruction on manslaughter because the medical examiner could not say whether the stabbing was intentional. 24RR 221.

Of course the medical examiner could not say whether the stabbing was intentional (or reckless or in self-defense) just from looking at the wound. No one could. This is not evidence from which a jury could rationally find that Appellant is guilty only of manslaughter. *Cf. Segundo*, 270 S.W.3d at 91 (finding that trial court did not err in denying requested instruction when medical evidence

raised only the theoretical possibility that the appellant was guilty only of the lesser-included offense).

The same is true for the size of the knife. Some evidence showed that the blade of the knife was 2.5 inches, and Appellant argued that this evidence supports an instruction on manslaughter. 21RR 232.

Appellant stabbed the victim in the chest with a knife. Evidence that the blade may have been 2.5 inches is not evidence that would permit a jury to rationally find that Appellant is guilty only of manslaughter.

Appellant does not re-urge any of the above evidence in her brief to this Court. Instead, she focuses on Ryan Moore's testimony, but this testimony does not support an instruction on manslaughter either.

Moore testified that the victim lunged at Appellant twice. 27RR 168-71. On the second lunge, he thought that the victim hit Appellant in the head. 27RR 171-75. Appellant was standing with her arms crossed. 27RR 172-73. After the victim hit Appellant in the head, Appellant uncrossed her arms and swung back. It was a single, overhand swing. 27RR 173, 176, 234, 246-47, 258. Moore grabbed

Appellant's hand and saw a knife. Moore wrestled Appellant for the knife, got it out of her hand, and kicked it away. 27RR 176-81. After Moore got the knife away from her, Appellant appeared shocked or confused, then she took off. 27RR 181. Moore thought Appellant stabbed the victim as a reflex or reaction to having been hit in the head by the victim. 27RR 224.

Appellant highlights Moore's testimony that Appellant stabbed the victim as a reflex or reaction to having been hit in the head by the victim. This testimony arguably raises the issue of whether Appellant's actions were voluntary, whether she was acting in self defense, and whether she was under the influence of sudden passion. The jury was charged on each of these issues. CR 286-91, 300, 305.

But Moore's testimony does not show that 1) Appellant did not intend to cause the victim's death, 2) she was not aware that stabbing the victim in the chest was reasonably certain to cause death, 3) she did not intend to cause serious bodily injury, and 4) she was aware of but consciously disregarded a substantial and unjustifiable risk that the victim's death would occur. To the contrary, Moore's testimony suggests that Appellant intended to cause death or injury in

retaliation for the victim's alleged assault. In any case, there is nothing about Moore's testimony that would permit a jury to rationally find that Appellant is guilty only of manslaughter.

Appellant also argues that Moore's testimony shows that the stabbing was not premeditated. Appellant mistakes premeditation for intent. *Crane v. State*, 786 S.W.2d 338, 345 (Tex. Crim. App. 1990) (explaining that premeditation is not an element of murder). An act does not have to be premeditated—or the subject of a period of reflection—to be intentional. Intent can be formed in an instant.

Additionally, Appellant's brief focuses exclusively on whether Appellant intended to cause death or serious bodily injury and ignores the other way in which the State alleged murder—knowingly. Thus, it is not enough that there be evidence that Appellant did not intend to cause death or serious bodily injury. There must also be evidence that Appellant was not aware that stabbing the victim in the chest with a knife was reasonably certain to cause death.

Appellant's brief also argues that the trial court should have given an instruction on manslaughter because the jury could have believed that her *mens rea* was reckless since her *mens rea* was proven

circumstantially and it is always possible that a person's mental state is different than it appears.

There are problems with this argument. First, Appellant cites sufficiency-of-the-evidence cases (*Griffin, Hooper, Dillon, Laster*) instead of cases concerning whether a court is required to give an instruction on a lesser-included-offense.

More importantly, Appellant's argument ignores the second step of the two-step test. It is not enough that the jury could believe that the appellant is guilty of a lesser. That is true for every lesser-included offense because the proof necessary to establish the lesser is included within the proof necessary to establish the greater offense. *Aguilar*, 682 S.W.2d at 558. Instead, there must be some evidence directly germane to the lesser offense, from which a jury could rationally find that if Appellant is guilty, she is guilty *only of* the lesser-included offense, and meeting this threshold requires more than mere speculation about what is "possible." *Id.*; *Cavazos*, 382 S.W.3d at 385; *Wortham*, 412 S.W.3d at 558.

In conclusion, Appellant has not pointed to any evidence directly germane to recklessness, and certainly none that would allow a jury to

rationality find that if Appellant is guilty, she is guilty only of manslaughter. Thus, Appellant is not entitled to an instruction on manslaughter, and the judgment should be affirmed.

V. Comparison to other cases

Appellant argues that the court of appeals erroneously relied on *Cavazos* to find that Appellant is not entitled to an instruction on manslaughter. She distinguishes *Cavazos*, arguing that the appellant in that case used a firearm, which is a deadly weapon *per se*, and that he shot his victim twice.

The facts in *Cavazos* are not identical to this case, but the appellant in *Cavazos* presented a better argument for an instruction on manslaughter than Appellant does, and this Court still held that he was not entitled to such an instruction. *Cavazos*, 382 S.W.3d at 385-86.

The appellant in *Cavazos* told a friend that he did not mean to shoot anyone. *Id.* at 385. This is direct evidence of his mental state, which negated the charged offense. There is no such evidence admitted in Appellant's case.

Additionally, use of a firearm often gives rise to an instruction on a lesser offense in a situation where the shooter claims not to have known that the firearm was loaded and/or that the firearm discharged unintentionally during a struggle. *See, e.g., Lugo*, 667 S.W.2d 144.

No such argument can be made in this case. Appellant used a knife, which cannot be “unloaded.” There is also no evidence that Appellant stabbed the victim in the chest unintentionally during a struggle.

Appellant also takes issue with the fact that the appellant in *Cavazos* shot his victim twice, whereas Appellant only stabbed her victim once. It is true that a single stab might give rise to a manslaughter instruction under some circumstances. But not under the facts of this case. There is no evidence that the stabbing happened unintentionally, or during a struggle, or due to a bump of the arm, or anything of that nature. To the contrary, Moore testified that Appellant stabbed the victim because the victim hit Appellant in the

head, and Moore had to grab Appellant and wrestle the knife out of her hand.¹

Appellant cites to *Schroeder* to support her argument for a lesser, but *Schroeder* is distinguishable—the appellant told the police that he accidentally shot his wife while they were struggling over a firearm—and, in any case, *Schroeder* was reversed by this Court, which held that the appellant was not entitled to a manslaughter instruction because he testified that he “blacked out,” and thus, there was no evidence that would permit a jury to rationally find that the appellant was aware of, but consciously disregarded, a substantial and unjustifiable risk that the victim would die as a result of his conduct. *Schroeder v. State*, 133 S.W.3d 654, 657 (Tex. App.—Corpus Christi 2003), *rev’d*, 123 S.W.3d 398, 401 (Tex. Crim. App. 2003); *see also Roy*, 509 S.W.3d at 317-19.

Similarly, there is no evidence in this case which would permit a jury to rationally find that, at the time of the stabbing, Appellant was

¹ Other witnesses gave different accounts of what happened, but Appellant has not argued that these accounts support her request for a manslaughter instruction.

aware of, but consciously disregarded, a substantial and unjustifiable risk that the victim would die as a result of her conduct.

A comparison to *Saunders* shows that it is inapposite as well. *Saunders* was convicted of murdering his girlfriend's 5-month-old child. The cause of death was a hemorrhage stemming from fractures in the child's skull, which were probably caused by squeezing the child's head with a hand on more than one occasion. This Court held that, based on a different interpretation of this evidence, a jury could have rationally concluded that the appellant was not aware of the risk of death and, thus, the trial court erred in refusing to give an instruction on criminal negligent homicide. *Saunders*, 840 S.W.2d at 390-92.

There is a world of difference between squeezing someone's head on multiple occasions, eventually causing their death, and stabbing a person in the chest with a knife. Under one scenario, a jury could quite rationally find that the defendant did not intend or know that his actions would cause death or serious bodily injury, especially since the evidence showed that he had done so on several occasions without killing or seriously injuring the child. But that finding is simply not

rational when the defendant sticks a knife in someone's chest. And there is no evidence that Appellant had stabbed someone in the chest before without seriously injuring or killing them and, therefore, was somehow unaware that stabbing someone in the chest could cause serious bodily injury or death.

Appellant's case is more akin to *Aguilar*. The appellant in *Aguilar* was charged with attempted burglary of a habitation with intent to commit theft, and he wanted an instruction on attempted criminal trespass because there was no direct evidence of his intent to commit theft. This Court held that he was not entitled to such an instruction because there was no evidence in the record from any source that showed that if the appellant was guilty, he was guilty of attempted criminal trespass only. *Aguilar*, 682 S.W.2d at 558.

Similarly, in Appellant's case, there is no direct evidence of Appellant's intent, but there is also no evidence from any source that shows that she is guilty *only of* manslaughter.

The trial court did not err in refusing to submit an instruction on manslaughter, and the judgment should be affirmed.

In the event that this Court determines that Appellant is entitled to an instruction on manslaughter, the State asks this Court to remand for a harm analysis, especially in light of the pending petition that asks this Court to reconsider the standard for harm in such cases.²

Prayer

The State asks the Court of Criminal Appeals to overrule Appellant's point of error and affirm the decision of the Court of Appeals.

Respectfully submitted,

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² *Roy v. State*, PD-0676-17, filed August 3, 2017.

Certificate of Compliance and Service

I certify that this brief contains 3,424 words. I further certify that, on the 14th day of August, 2017, a true and correct copy of this brief was served electronically through the electronic filing manager on Appellant's attorney, Alexander Calhoun, 4301 W. William Cannon Dr., Suite B-150, #260, Austin, Texas 78749, and Stacey Soule, State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711.

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